applicants, notwithstanding the FCC's good faith in trying to disregard the potential economic loss if the temporary operator was ultimately denied the final grant.

This investment in the Biltmore Forest FM station and resulting "awkward" situation are apparently the "equities that already exist in Orion's application" which Commissioner Ness does not want to ignore. See, p. 23, supra.

However, Orion's "awkward" situation is of its own making. It chose to construct and to operate, and to borrow substantial sums of money that were collateralized by the Biltmore Forest FM station, based upon at best a conditional grant from the FCC.

Accordingly, the FCC is legally foreclosed from "bailing out" Orion, because of its previous and substantial investment in the Biltmore Forest FM station, through implementation of a "new" comparative criteria that would merely reaffirm the previous selection of Orion, but under a revised and post hoc rationale. See, Consolidated Nine, Inc. v. FCC, 403 F.2d at 589. Orion's attempt to use its previous investment in the station as an "equitable" consideration to now "bootstrap" itself into a permanent FCC license is contrary to law and is inherently unfair and prejudicial to the competing applicants.

(4) A New Comparative Criteria Could Not Be Implemented in a Fair and Equitable Manner or Consistent with Law

In the notice of proposed rulemaking, at para. 19, the FCC sought comment on three factors to use in a comparative hearing. These factors are (a) past broadcast experience; (b) past broadcast

record; and (c) daytimer preference. However, even if Senator Helms had not irreparably tainted this rulemaking by demanding that these broadcast-related factors be used in order to favor Orion in selecting a permanent licensee in the Biltmore Forest FM proceeding,3/ such "new" comparative hearing criteria could not be implemented in a fair and equitable manner, or consistent with law.

The use of any criteria based upon the past broadcast affiliations of an applicant would invidiously discriminate against minority and female applicants, who presumably have been limited in or denied the opportunity to be employed by or own broadcast stations. Such a criteria would also discriminate against younger applicants, who simply because of their age have not had the opportunity to own or work in broadcast stations.

If past broadcast affiliations are to be used as a comparative criteria, any deficiencies or poor performance of the applicant's principals would be relevant and a matter to be thoroughly examined at hearing. Such examination should include the failure of a principal who was a broadcast station owner to pay taxes resulting from the broadcast operations and any tax liens imposed on the station.

If past broadcast affiliations are to be used as a comparative criteria, a problem arises as to how to quantify those factors. What would count more, work experience or ownership? How would

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3/ See, Congressional Record, October 27, 1997, p. S11308.

non-managerial experience be compared with managerial experience? Do minute or trivial distinctions violate the letter and spirit of Bechtel?

What weight should be given to the number of years of experience? Should 40 years of broadcast experience be more decisionally significant than 35 years experience? Should no weight or credit be given for experience over a certain period, such as 7 years? Under the FCC's former comparative policy, no credit was given for broadcast experience over 7 years in order to give younger applicants a fair chance to compete for the new broadcast license.

Another problem arises in an applicant with several principals where only some of the principals have past broadcast experience, or the principals have differing amounts. If, for example, one principal with 40% ownership has substantial and exemplary past broadcast experience, but the other 60% of the ownership has little or no past broadcast experience, how much credit does the applicant receive, 40% or 100%? Should the principal with past broadcast experience be required to have at least 51% of the ownership or control of the applicant in order to receive comparative credit?

Whatever credit is given for past broadcast affiliations would have no rational connection to the predicted future performance of an applicant, unless the principal of that applicant with the past affiliation proposes to have a key management role at the new station. However, this would amount to resurrection of the

discredited "integration" policy and would violate Bechtel.

Use of an "AM daytimer" preference would also present problems of invidious discrimination against minority and female applicants. Most AM daytime broadcast stations are owned and have been owned by white males. The FCC recognized this problem when it first adopted the "AM daytimer" preference by giving it co-equal weight with a "minority" preference. However, the "minority" preference is no longer used by the FCC in broadcast proceedings.

Under the "AM daytimer" preference as originally adopted by the FCC, it was limited to an applicant who owned and operated an AM daytime station and who was applying for an FM license in the same community of license as the AM daytime station. If an "AM daytimer" preference is used, this aspect of the policy should be strictly maintained.

In the Biltmore Forest proceeding, Willsyr and other applicants applied based on the fact that no AM daytime station was licensed to Biltmore Forest and thus in "reasonable reliance" that an "AM daytimer" preference would not be applicable. Moreover, any applicant claiming an "AM daytimer" preference must be the same corporate entity, or the same principals (with the same ownership percentages), which owned the AM daytime station. Otherwise, use of this preference would be subject to gamesmanship and abuse.

Use of a local residence criteria would discriminate against applicants who had no opportunity to live in the community of license. In the case of Biltmore Forest, it is actually an

incorporated "country club" which is open to only very wealthy persons. In any event, use of a local residence criteria is a denial of equal protection of the law because it arbitrarily limits the award of a valuable public resource owned by all U.S. citizens to just a handful who happen to live in the community of license.

If the FCC adopts a "new" comparative criteria, the question arises as to whether the applicants should be permitted to amend their applications in order to conform as much as possible to the new criteria? If not allowed to do so, a "due process" problem arises for the FCC.

The applicants are prejudiced because new criteria is imposed in which they had no reasonable notice and which they had no opportunity to attempt to conform. The applicants are especially prejudiced if the "new" criteria is adopted because of the demand of a U.S. Senator who wants to benefit a particular applicant.

If the applicants are allowed to amend, should major amendments be allowed in order to bring in new controlling principals, or to eliminate passive principals? Should applicants be allowed to amend their financial certifications and their tower sites? If so, should applicants be allowed to amend to eliminate previously litigated disqualifying matters, such as deficient financial certifications and tower sites? Should applicants be allowed to amend to eliminate previously litigated "character" matters?

In sum, too many problems and too many "due process" issues

are raised by the adoption of "new" comparative hearing criteria to make it legally feasible to use such criteria. Any one change in the process, changes the whole playing field to the detriment of one or more applicants.

Moreover, as the FCC observed in the notice of proposed rulemaking, at paras. 19-20, the record to date does not include persuasive evidence demonstrating the predictive value of any comparative criteria. Indeed, Mr. Kennard bluntly told Senator Helms that the FCC has struggled for over four years, without success, to implement a viable comparative criteria and a criteria that is consistent with Bechtel. See, responses of Mr. Kennard to Senator Helms, October 6, 1997, p. 2.

(5) Use of the Existing Hearing Record Raises Due Process Problems

If the applicants are required to litigate their cases based upon the existing hearing record, as demanded by Senator Helms,4/ "due process" problems arise. This is because the record is stale and many circumstances regarding the applicants have changed, thus making the record irrelevant. Some hearing records, such as for Biltmore Forest, date back to 1989. This is almost 10 years.

In the course of 10 years, the principals of applicants might change their career plans, some principals might retire or become ill or die, financial circumstances of the applicants and their principals might change, tower sites might become unavailable,

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4/ See, Congressional Record, October 27, 1997, p. S11309.

applicants with existing stations might sell the stations for reasons unrelated to their application, and the ALJ who heard the evidence at hearing might be retired.

An issue arises as to the continuing relevance of candorless or deceitful hearing testimony given some 10 years ago. Under the FCC's character policy, the passage of time mitigates the seriousness of such transgressions. Should such mitigation apply in the hearing proceedings in question?

Another problem in use of the existing hearing record with respect to basic qualifying issues is that applicants raise basic qualifying issues and develop a hearing record for such issues as a proxy or substitute for relying upon the "integration" criteria. Because of this interrelationship, the use of the hearing record would raise "due process" problems in view of the invalidity of the "integration" criteria. The whole hearing record is simply tainted by the "integration" criteria.

In conclusion, the FCC should not rely upon the existing hearing record to determine the grantee in the pending proceedings. Such record is stale and irrelevant and is tainted by the "integration" criteria. Moreover, use of the existing hearing record, as demanded by Senator Helms, to benefit one particular applicant, raises the appearance of political bias or impropriety and thus legally forecloses the FCC from such use. ATX, Inc. v. U.S. Dept. of Trans., 41 F.3d at 1527; Pillsbury Co. v. FTC, 354 F.2d at 964; In Re Murchison, 349 U.S. at 136.

(b) Proposed Use of Competitive Auctions

Willsyr agrees with Senator Helms that the Bechtel decision and the use of competitive auctions to now select a grantee (in the cases that have previously gone through hearings) are patently unfair. However, this unfairness has equally impacted every applicant that has participated in the comparative hearing process, and not just Orion. None have won and all have lost.

As a result of Bechtel, every applicant that has participated in the comparative hearing process has utterly wasted its time and resources in a selection process that the D.C. Circuit described as "inherently arbitrary and capricious and peculiarly without foundation." Many applicants have spent hundreds of thousands of dollars in legal fees and expenses and have spent over ten years of their lives lost in a regulatory maze.

Nothing can be done to fix the selection process without prejudice to one or more applicants. The use of auctions for applicants who participated in the hearing process only compounds the problem and adds to the cost and to the misery of the applicants.

(c) Reimbursement and Compensation to the Applicants Under Winstar

The only fair and equitable solution to the problems caused by Bechtel is for the U.S. Government to reimburse and compensate all the applicants who participated in the comparative hearing process for their costs and expenses and for their wasted time.

The precedent for such action is the U.S. Supreme Court's

decision in Winstar v. U.S., 116 S.Ct. 2432 (1996). This decision has been broadly interpreted to allow claims against a Federal agency for monetary damages caused by a shift in regulatory policy, even a legitimate shift. Wells Fargo Bank, N.A. v. U.S., 88 F.3d 1012 (Fed. Cir. 1996); Harbert/Lummus v. U.S., 36 Fed. Cl. 494 (1996). That legal rationale is applicable to the applicants who have suffered monetary damages as a result of Bechtel.

The FCC should request the Congress to authorize legislation which would establish class action procedures for making such claims against the U.S. Government under Winstar and which would provide for the claims to be handled on an expedited basis. Claims of this nature are normally handled by the U.S. Court of Federal Claims. The funding for such claims could be charged to the auction proceeds from the applicants who filed after July 1, 1997.

The FCC could, arguably within existing law, mitigate the damages of the pre-Bechtel applicants.5/ It would be done by conducting auctions, but requiring that the proceeds go to the applicants who are not the high bidders, so as to reimburse them for their costs and compensate them for their time in the pre-Bechtel hearings and related matters, and would be based upon their legitimate costs and a pre-determined amount for their time.

The high bidder would receive a credit from the FCC for the amount of its costs and time in the pre-Bechtel hearings and

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5/ See, letter from Senator John McCain, dated October 23, 1997, Congressional Record, October 27, 1997, p. S11310.

related matters. If the high bidder has been operating the station under interim authority, the amount of the credit would be reduced by the amount of profits from the interim operation.

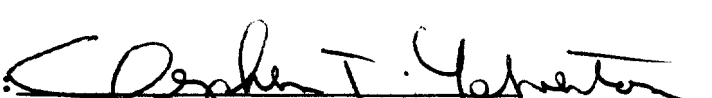
As a result of such a procedure, the applicants could be made financially whole, as if they had first applied after July 1, 1997, and had never participated in a comparative hearing. If the auction bid price was not high enough to make all the applicants whole, they could then file a Winstar claim with the U.S. Court of Federal Claims for the difference.

Challenges to the qualifications of the high bidder should be strictly limited in order to bring closure to the proceeding. If the high bidder believes that it should have paid nothing for the license, it could request Senators Helms and Faircloth to sponsor legislation which would require the U.S. Treasury to reimburse it for the total auction bid cost of the license.

WHEREFORE, in view of the foregoing, it is requested that the FCC immediately adopt rules and procedures for the permanent grant of licenses in the pending proceedings which are fair and equitable to all the applicants.

Respectfully submitted,

WILLSYR COMMUNICATIONS,
LIMITED PARTNERSHIP

By: 

Stephen T. Yelverton, Esq.
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Tel. 202-276-2351

January 26, 1998

LAUCH FAIRCLOTH
NORTH CAROLINA

United States Senate

WASHINGTON, DC 20510-3305

October 22, 1996

The Honorable Reed E. Hundt
Chairman, The Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

VIA FACSIMILE

Dear Mr. Hundt:

We are extremely troubled by the FCC's decision yesterday to revoke the operating license for WZLS.

After the plight of WZLS was reported in the Asheville Citizen Times, we wrote to you and stated that we thought it was wrong for any citizen, particularly one who has been in the radio business since 1947, to be put through this kind of process to procure a radio station license from the federal government. WZLS is a family owned station, and Mr. Zeb Lee is 84 years old.

The FCC's action yesterday is outrageous and callous, and is typical of why so many Americans believe that the federal government works against them, not for them.

As you know, this process began in 1987 and took six years for WZLS to secure the license. In 1993, a court decision, unrelated to WZLS, forced open the bidding process again. Now, three years later, the FCC has decided to take WZLS off the air. This decision is more troubling in light of the fact that the present owners of WZLS were forced to sell their other radio station in order to obtain the new license.

This decision appears to turn on the issue of WZLS constructing a radio station, after notice of the 1993 case, however, WZLS was directed to construct a new station as part of the getting the license for the new FM station.

It is troubling that a citizen has been induced by the federal government to take a certain action, only to be told years later that he should not have relied on the government's word.

We are requesting that you immediately grant a stay of this decision. Further, we are asking that the FCC, as soon as possible, reconsider this decision and award a permanent license to Mr. Lee and his family.

Sincerely,

Lauch Faircloth

Jesse Helms

Federal Communications Commission
Washington

OFFICE OF
THE SECRETARY

December 3, 1996

Honorable Lauch Faircloth
United States Senate
Washington, D. C. 20510-3305

Honorable Jesse Helms
United States Senate
Washington, D. C. 20510-3305

Re: File Nos. BPH-870901ME & BPIH-950707MD

Dear Senators Faircloth and Helms:

Thank you for your letter dated October 22, 1996, concerning the Commission's recent action in Orion Communications, Ltd., FCC 96-402 (adopted October 3, 1996). As you are aware, that decision reaffirmed an earlier Commission action that rescinded the construction permit of Orion for station WZLS(FM) and extended special temporary authority to Orion to continue operation of WZLS(FM) until Biltmore Forest Radio, Inc.'s application for joint operating authority was granted and Biltmore Forest notified the Commission of its readiness to commence operations.

Your letter was forwarded to the Office of the Managing Director for reply in keeping with the Commission's ex parte rules, which deal with communications relative to all "restricted" proceedings under consideration by the Commission. The Managing Director asked me to respond on his behalf.

The ex parte rules require service on all parties of filings addressing the merits or outcome of restricted proceedings. Because this proceeding involves mutually exclusive applications and also an application for joint operating authority that has been opposed, the proceeding is "restricted" and will continue to remain so until such time as a Commission decision is made and is no longer subject to reconsideration or review by the Commission or the courts. See 47 CFR Section 1.1208.

Therefore, in accordance with FCC Rules, as found in 47 CFR Section 1.1212(e), I have, by copies of this letter, provided notice and disclosure of your communication to all parties to these proceedings. Additionally, this letter and your communication have been placed in a public file associated with (but not made a part of) the record in the proceeding. See 47 CFR Section 1.1212(d).

You may be assured that the Commission will closely examine all evidence in the record in order to determine which course of action will best serve the public interest, convenience and necessity.

Sincerely,

William F. Caton

William F. Caton
Acting Secretary

cc: Lawrence J. Bernard, Jr., Esq.
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Zeb Lee

Dear Friend,

OK. Give it to me straight. Tell me the truth.

I'm 86 years old. I'll take it like a man.

Is it fair?

That's all I want to know. Nothing more. Nothing less.

Just give me your "Yes" or "No" answer.

I've even enclosed an envelope to make it easy for you.

Here's the story...

The judge said of one of my opponents, "They lack the requisite character." He said they lied in their application. He described another applicant group as a minority ownership "sham."

And, of yet another applicant, the judge wrote that they had made "abjectly false representations" and that they "aren't basically qualified."

The F.C.C. judge commended me for my "splendid stewardship" in broadcasting.

That's one of the reasons he awarded me the license for a new FM radio station in Asheville, North Carolina in 1987.

But for the last 10 years, I've been forced to spend practically everything I have fighting off legal challenges from these same opponents.

Finally the FCC gave me the go-ahead to go on the air. But first they said I had to sell my existing AM station for a fraction of its worth. And I did as the F.C.C. ordered.

For nearly three years my wife Betty, sons Brian and Barry and I operated WZLS. We earned only praise from the local community.

Then out of the blue the FCC staff pressured me to sit down and cut a deal with my opponents - the same opponents the FCC Judge had denounced earlier!

780 Hendersonville Road, P.O. Box 15869, Asheville, N.C. 28813

When I refused to buy them off (some might call it blackmail) the FCC reversed its decision and awarded the Broadcast rights to my opponents.

Could it be because one of my opponent's partners is Melvin Watt, a Congressman whose group claimed minority preferences?

I could accept the loss if I had been defeated fair and square, but something stinks about this whole mess.

So I ask you again, is it fair?

If you think I have been treated fairly by the Clinton appointees in the FCC then check off YES on the enclosed reply form and mail it back to me.

Maybe my wife and two sons will feel better about it.

I'd be surprised if you or any other impartial observer thinks I've been treated fairly.

If you think I have been treated unfairly and unjustly then won't you please let me know.

It would help. It would really help.

Sometimes I feel like I'm out here all by myself. That nobody cares.

How can this happen in America? Is it fair? Is it right?

That's why your vote of confidence would mean so much to me and to my family.

During my more than 59 years in broadcasting I have always tried to play by the rules. And I have taught my sons to do the same thing.

I have always believed that justice will prevail.

My wife Betty and I and our two sons Brian and Barry operated our radio stations (first the AM and then the FM) as a public trust.

We care about what happens to our friends and neighbors.

I have personally announced over 4,000 high school football games and thousands of high school basketball games.

I've lived right here in Asheville for the last 59 years, trying to help out whenever I can.

But now, after more than 59 years in broadcasting I've been forced out of the radio business by federal bureaucrats.

Is it just because the FCC, led by Clinton appointees, think it's not "politically correct" to award an FM license to a family business?

Does the F.C.C. now support those applicants who request minority preferences over a family with 50 years of outstanding broadcast experience?

I don't know.

But I don't think it's fair.

And my opponents who promised "diversity" and "fresh air" are now providing "canned" computerized programming out of Florida.

There's no doubt in my mind but that they plan to "flip" the station and sell it to a big corporation for a huge profit.

The other applicants' representatives basically told us as much.

I think they don't care one whit about the Asheville community. I think they're just out to make a fast buck and they don't care if they cut ethical corners, use race, or behind the scenes politics to do it.

It stinks to high heaven.

But their plan has always been to keep dragging this out in order to bleed me dry financially and run out the clock on me.

They know I'm old and a man of limited means.

But this old man isn't finished yet!

I have never asked for help before because I have a lot of pride.

But now I'm up against a wall.

I still owe lease payments and bills on a station, which isn't even on the air!

And I am still fighting in Federal Court to gain justice.

Our faith in God gives us the strength to go forward every day.

But, I'm reaching the bottom of my financial barrel.

Now, no one in my family is working. I don't have a job and my wife and two sons no longer have jobs. They took away our livelihood.

Really, my only chance to get justice depends on you.

At the recommendation of friends I have established a Zeb Lee Justice Fund.

There is just no possible way that I can single handedly come up with the money to pay legal costs and to battle for justice.

And when this battle is over (even if it goes all the way to the U.S. Supreme Court), I'll shut this fund down.

But this case is important to me and to you.

My case certainly is not isolated. There's no doubt in my mind that countless other good applicants, perhaps in your hometown, have been discriminated against just because they weren't "politically correct."

Justice has been bent and twisted to accommodate the political objectives of self-serving politicians and their accomplices.

That's why I'm hoping you will help my family and me today with a contribution to the Zeb Lee Justice Fund.

Anything you contribute, no matter how large or small, will be greatly appreciated.

Sure it would be great if you could send $1,000 or even more.

But, if you can't do that, I hope you will send something less, perhaps just $20.

Believe me your $20 will be used to help Betty and me and Brian and Barry see justice done.

We're on the ropes. So, as I said, anything you send will be greatly appreciated.

But hurry. We have a court date in September and the legal bills are mounting up fast. Thank you for hearing me out.

Sincerely,

Zeb Lee

P.S. I really want to know if you think the way I have been treated is fair. Just check off YES or NO and send it back to me today. And if you can, won't you please include a check to help in my legal battle with the FCC. I don't like to ask, but I can't fight back without your help. Please hurry! God bless you.

Was I Treated Fairly?

__ **YES** Zeb, I think you were treated fairly. Don't be a crybaby.

__ NO Zeb, I share your outrage! You and your family were treated shabbily and unjustly. I urge you to fight on for justice.

- -

Here's How You Can Help...

__ Zeb, I appreciate your integrity and I'll help you fight back. If we let them win this case no one will be safe. Here's my check for:

__$1,000 (wow!) __$500 __$250 __$100

__$75 __$50 __$30 __$20 $_____Other

(Please make your check payable to: Zeb Lee Justice Fund and return in enclosed envelope)

Name _____

Street Address _____

City & State _____ ZIP _____

Unfortunately contributions to the Zeb Lee Justice Fund are not tax deductible.

Zeb Lee Justice Fund
780 Hendersonville Road
P.O. Box 15869
Asheville, NC 28813-0869

Internet news from Wired News.

Helms a Threat to Kennard Nomination?

by Wired News Staff
12:07pm 6.Oct.97.PDT Senator Jesse Helms, fresh from torpedoing one high-profile Clinton administration nominee, is threatening to block the nomination of William Kennard to head the Federal Communications Commission, The New York Times reported today.

[Image]
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[WIRED magazine]

The paper said the North Carolina Republican is targeting Kennard, the FCC's general counsel for four years, because of dissatisfaction with the agency's dealings with Zebulon Lee, a broadcaster involved in licensing fights over several North Carolina radio stations.

The paper said the North Carolina Republican wants Kennard's assurance that he will help Lee, and has asked Kennard for details about his role in the disputes.

A Senate Commerce Committee is to vote Wednesday on the nomination. Helms is not a member of the

Helms is not a member of the committee, and thus would have to act through colleagues on the panel if he wants to stop Kennard.

Should he decide to wage such a fight, Helms could provoke a political battle far uglier and costlier than his recently concluded tangle with former Massachusetts governor William Weld, President Clinton's former nominee to become ambassador to Mexico. Helms, chairman of the Foreign Relations Committee, refused to hold a confirmation hearing for Weld, a moderate Republican, because of Weld's declarations of support for medicinal marijuana use.

Most of the Senate's GOP colleagues went along with Helms - a notable exception was Senator Richard Lugar of Indiana, who threatened to waylay North Carolina farm programs in his role as head of the Agriculture Committee - but it's unlikely they would in Kennard's case.

First, Kennard enjoys wide support for his performance as FCC counsel. Under his guidance, the commission has begun prevailing far more often in court challenges to its rulemaking - it wins an average of four out of five cases, as opposed to three of five before he took over. Second, he talked the right talk - competition is good, regulation is bad - in his public statements, and appears sensitive to congressional demands that the commission take steps to streamline the process of introducing competitors into phone, cable TV, and other markets under the terms of the 1996 Telecommunications Act. Third, the reigning party in the White House has the privilege of appointing three of five FCC commission members. The Helms move potentially contravenes that agreement.

And last, Helms would be interfering with an important historical footnote - Kennard is the first African American nominee to head the FCC, a position far more important to the life of the country than, say, ambassador to Mexico.

New York Times

October 6, 1997

F.C.C. to Defer Decisions on Phone Deals

A 'Lame Duck' Panel Will Wait, Hundt Says

By SETH SCHIESEL

The Federal Communications Commission chairman, Reed E. Hundt, has informed the office of John McCain, Republican of Arizona and chairman of the Senate Commerce Committee, that the present commission does not intend to decide two highly visible matters pending before it, preferring to wait until the Senate approves its new members and chairman.

The first is a preliminary ruling that would allow Worldcom Inc.'s unsolicited $30 billion bid for the MCI Communications Corporation to proceed. The second is a challenge from the AT&T Corporation to the BellSouth Corporation's petition to offer long-distance telephone service in South Carolina.

Under normal circumstances, the first rulings on these issues would be made within the next week or so. But, Mr. Hundt

Rumblings that Senator Helms may try to block yet another nomination.

paid, "There are two major votes that ultimately cannot be resolved by the present commission and so should not be shaped materially at their inception by the present commission."

He added in an interview Saturday, "A prime draft commission is not the proper group to take these actions when it is not going to be around to finish them off."

But if the confirmation of William E. Kennard, the commission's current general counsel, is delayed, Mr. Hundt said he would re-evaluate his position.

While it appeared on Wednesday, when Mr. Kennard had his confirmation hearing before the Commerce Committee, that he would easily sail into office, a few sentiments have begun to blow from the office of Senator Jesse A. Helms, Republican of North Carolina.

Senator Helms has made it clear that he will consider trying to block Mr. Kennard's nomination unless Mr. Kennard agrees to help a businessman, Ronald Zebulon Lee, secure a radio license in Asheville, N.C., according to people close to the commission and on Capitol Hill who insisted on anonymity.

Despite the fact that Senator Helms does not sit on the Commerce Committee, the Senator's rules would allow him to block Mr. Kennard's nomination if he was determined enough. Calls to Senator Helms's office were not returned, but the Senator has in the past supported Mr. Lee's case.

Mr. Lee has battled with the commission for almost 10 years over radio permits. His company, Orion Communications, has sued the commission.

Brian Lee, Zebulon's eldest son, said

Continued on Page 13

F.C.C. Chairman Defers Rulings Involving Worldcom and AT&T

Continued From First Business Page

yesterday that he spoke with members of Mr. Helms's staff last month when he was in Washington for a court proceeding involving Orion's suit against the F.C.C. "William Kennard as general counsel of the F.C.C. was involved in taking away our license," Mr. Lee said. "Why?"

The budget bill recently passed by Congress directs the F.C.C. to auction radio licenses whose ownership is disputed. Mr. McCain and Mr. Hundt support that plan. The Lees do not. "After we fought and won repeatedly under one set of rules, McCain decides to change the shape of the playing field and now he has called for having the radio station auctioned off to the highest bidder," Brian Lee said.

People on Capitol Hill, who insisted on anonymity, said that Senator Conrad Burns, Republican of Montana and a member of the Commerce Committee, had passed on to Mr. Kennard questions from Mr. Helms inquiring about Mr. Kennard's role in the Lee dispute.

"What Senator McCain is hoping is that when Mr. Kennard answers Senator Helms's questions and gives Senator Helms the information that he wants, Senator Helms will let the nomination move forward expeditiously," said Mark Buse, the Commerce Committee's policy director.

The committee intends to consider Mr. Kennard's nomination this Wednesday and the full Senate could vote on it as early as Wednesday.

Mr. Hundt's act of deference appears a bit unusual — he has not been shy in the past. And while he said he hoped not to rule on BellSouth's application, he still ridiculed the company during a speech on Friday in Philadelphia. "When a company shows up with 20 boxes of documents and photographers and press releases about how it ought to immediately be granted its results, you wonder whether it's a circus or a serious application," he said.

In response, David J. Markey, BellSouth's vice president for governmental affairs, said in a statement, "Anyone who says BellSouth is not serious about opening its markets is not in touch with reality and doesn't understand that competitors for business customers are coming into the market daily."

Federal Communications Commission
Washington, D.C. 20554

October 6, 1997

HAND DELIVERED

The Honorable Conrad Burns
Chairman, Subcommittee on Communications
Committee on Commerce, Science and
Transportation
United States Senate
227 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Burns:

Enclosed please find my responses to your post-hearing questions submitted on behalf of Senator Jesse Helms. I also enclose a copy of a letter to Senator Lauch Faircloth from FCC Chairman Reed E. Hundt which provides additional information about the proceeding which is the subject of Senator Helms' inquiries. The questions pertain to a proceeding which is "restricted" under the Federal Communications Commission's ex parte rules. Therefore, I am serving a copy of my responses to all parties to the proceeding. Please feel free to call me at 202-418-1700 if you have any questions.

Sincerely,

William E. Kennard
General Counsel

Enclosures

RESPONSES OF WILLIAM E. KENNARD TO POST-HEARING QUESTIONS SUBMITTED BY SENATOR CONRAD BURNS ON BEHALF OF SENATOR JESSE HELMS

1. As you know, the recent budget legislation included a provision that appear[s] to require the FCC to apply auction procedures to pending applications for radio stations. These provisions were reportedly aimed at resolving the applications that have been in limbo since the Bechtel case struck down a part of the FCC's rules governing comparative license application proceedings. Please clearly state your views in response to the following questions:

a. In your opinion, is the FCC now required to apply these auction provisions to all pending application cases, or does the FCC have discretionary authority not to handle pending cases through this auction approach?

In the Balanced Budget Act of 1997, Congress required the FCC to use auctions to resolve all future comparative broadcast proceedings involving commercial stations. For pending applications, the statute states that the Commission "shall have the authority" to use auctions. The Conference Report states that this provision "requires" the Commission to use auctions for pending cases. The Commission will be determining in a rulemaking proceeding implementing the Balanced Budget Act of 1997 how it should proceed with these pending cases. The statutory language suggests that the Commission has discretion to use comparative proceedings for pending cases.

b. While most of the pending comparative cases had not gone through a hearing before an administrative law judge, and had at least an initial decision issued, a relatively small number of these cases had in fact been decided under the old rules by an ALJ and in some cases decisions made by the full Commission, although these decisions may have been on appeal. In those cases, the parties often had spent many years and hundreds of thousands of dollars to advance their applications under the old rules. Do you believe that it would be more equitable not to apply auction procedures to the cases which were far along in the process, where the applicants had played in good faith under the old rules, and to instead have those cases decided using any existing hearing record pursuant to such special rules as the Commission might adopt for deciding them?

I do believe that the Bechtel decision has caused unfairness to many applicants who have had further processing of their applications delayed and, as a result of that court decision, will necessarily have their applications processed under new procedures. I am quite sympathetic to their predicament. That is why the Commission argued to the court in Bechtel that the court's decision should only apply to new cases. Unfortunately the Commission was not successful and the court rejected this argument. As noted above, the issue of what those procedures will be, that is, whether some or all pending applications should be auctioned or decided pursuant to some new, yet-to-be developed criteria, will be a subject of the Commission's rulemaking proceeding implementing the Balanced Budget Act